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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 826

NATHAN BERGER, SAMUEL KAMINSKY and SIDNEY E. COHN,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

LOUIS B. BOUDIN,
Counsel for Petitioners.

INDEX

PETITION:

PAGE

A—Statement of the Matter Involved 2

B—The Statutes Involved 6

C—Questions Presented 8

D—Reasons Relied On For the Allowance of the Writ 13

E—Jurisdiction 14

BRIEF:

I—Opinion Below 17

II—Jurisdiction 17

III—Statement of the Case 18

IV—Specifications of Error 18

V—Argument 20

A—The order made by the District Court violated the due process clause of the Constitution, as well as the constitutional provision for trial by jury 20

B—The District Court had no power to place Petitioners Berger and Kaminsky on probation 22

C—The District Court had no power to delegate the "allocation" of "restitution" 23

D—The District Court was wholly without jurisdiction over Petitioners Berger and Kaminsky at the time of the making of the order affirmed by the decision sought to be reviewed 24

PAGE

E—The District Court had no jurisdiction over Petitioner Cohn 25

F—The District Court was wholly without power to order the payment of the sum involved as "restitution" 27

G—Petitioners Berger and Kaminsky were vitally interested in the proper distribution of the fund involved 31

Conclusion 33

CASES CITED

Burns v. United States, 287 U. S. 216 23

Ex parte Lange, 18 Wall. 163 29

Ex Parte Watkins, 7 Pet. 568 29

Ex parte Wilson, 114 U. S. 417 29

Hill v. United States, 295 U. S. 460 29

Matter of Morhous v. N. Y. Supreme Court, 293 N. Y. 131 29

People ex rel. Tweed v. Liscomb, 60 N. Y. 559 29

Re Banner, 151 U. S. 242 29

United States v. Follette, 32 Fed. Supp. 953 ..... 27, 29

United States v. Murray, 275 U. S. 347 23

STATUTES CITED

U. S. C. A., Title 18, Section 724 7

U. S. C. A., Title 18, Section 725 7

U. S. C. A., Title 29, Section 216 7

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Nathan Berger, Samuel Kaminsky and Sidney E. Cohn, respectfully pray that a *writ of certiorari* issue out of this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit, made on December 5, 1944, affirming an order made and entered in the District Court of the United States for the Eastern District of New York, in an action entitled "United States of America v. Promenade Clothes, Inc., Nathan Berger and Samuel Kaminsky", which said order directed Petitioner Sidney E. Cohn to sign certain checks for the payment of moneys out of a fund theretofore deposited by

Petitioners Nathan Berger and Samuel Kaminsky in Brooklyn Trust Company, a banking corporation doing business in the Borough of Brooklyn, City and State of New York, on pain of being punished as for a contempt of court in the event of his failure to sign such checks.

A

Statement of the Matter Involved

On October 18, 1941, an Information was filed in the District Court of the United States for the Eastern District of New York against Promenade Clothes, Inc., a corporation, and Petitioners Nathan Berger and Samuel Kaminsky, charging violations of the Fair Labor Standards Act. The Information was in thirteen counts. Four of the said counts, each charged the failure by Promenade Clothes, Inc. to pay to a particular employee, during a particular week, the minimum wages required by said law. Four other counts, each charged Promenade Clothes, Inc. with failure to pay a particular employee, during a particular week, for overtime performed by such employee during that week, at overtime rates as required by said law. Two of the other counts, each charged the shipment on a certain day, in interstate commerce, of merchandise produced under conditions violative of the law. Two of the other counts, each charged false entries in the books of Promenade Clothes, Inc. with respect to the number of hours worked by and wages paid to a certain employee during a particular week. The remaining count (Count XI) charged failure to keep proper records, as required by said law and regulations made thereunder, covering the wages and hours of the employees of Promenade Clothes, Inc. from on or about August 3, 1939, up to the filing of the Information.

On November 10, 1941, the defendants, who had never been convicted before, pleaded guilty to the said Informa-

tion. The corporation was thereupon fined the sum of $500 on each count, and Petitioners Berger and Kaminsky were placed on probation for eighteen months,—the imposition of sentence being suspended as to them. The probation order contained, in addition to the usual matters contained in such orders, a provision reading as follows:

> "(b) Restitution of wages due by the defendants or the Corporation herein specifically named, to industrial workers under the Fair Labor Standards Act of 1938, shall be made by the defendants jointly and severally, in the sum of $27,094.08 in quarterly payments of $6,773.52, commencing March 10, 1942, and on each and every quarter thereafter until the full sum of restitution has been paid; allocation of the said restitution among the said industrial workers and the amount to be paid to each is to be determined by the Director of the New York Regional Office of the Wage and Hour Division of the United States Department of Labor or under his direction" (Record, fols. 66-67).

Some time prior to June 18, 1942, an order to show cause was made by a judge of the District Court directing the Petitioners Berger and Kaminsky to show cause why the probation should not be revoked and sentence imposed, because of an alleged failure to comply with the probation order in failing to make two quarterly payments of "restitution" when they became due under the terms of the said order. On June 18, 1942, Petitioners Berger and Kaminsky appeared by Petitioner Sidney E. Cohn, who by that time had become their attorney, and offered to pay into court the full amount mentioned in the probation order for distribution under the said order,—no "allocations" having been made up to that time by the Administrator of the Wage & Hour Division (Record, fols. 163-164).

Thereupon the attorney for Petitioners Berger and Kaminsky and the attorney for the Administrator agreed that the money be deposited with the Brooklyn Trust Company to their joint order, to be distributed by means of checks signed by the two of them after the persons en-

titled to share in the fund, and the extent to which each was entitled to share therein, should have been ascertained. As a means of such ascertainment, it was agreed between them that the attorney for Petitioners Berger and Kaminsky should designate a Certified Public Accountant who, in conjunction with the accountants for the Wage & Hour Division, should ascertain the persons who were entitled to "restitution", and the amount to which each was entitled,—the attorneys to act upon the report of such accountants (Record, fols. 164-166).

The money was accordingly deposited on the same day with the Brooklyn Trust Company; and immediately thereafter Petitioner Sidney E. Cohn appointed one David J. Algase, a Certified Public Accountant, as the accountant to represent Petitioners Berger and Kaminsky in the ascertainment of the persons to whom payment should be made out of the said fund. The Wage & Hour Division refused, however, to permit Algase to participate in such ascertainment, taking the position that it alone was entitled to designate the persons to whom payment was to be made, and it refused to show the accountant any books, papers, or other evidence upon which he could arrive at any judgment as to the accuracy of any lists prepared by the Wage & Hour Division (Record, fols. 242-248). The accountants for the Wage & Hour Division informed Algase that the lists to be prepared by them would not be based on any books or documents, but upon a certain formula alleged to be applicable to the industry as a whole, but they refused to give him any information as to the nature of the formula (fols. 243-244). Algase thereupon reported to Petitioner Cohn that under the circumstances he could not certify to the correctness of any lists prepared by the Wage & Hour Division (fol. 245).

No lists or schedules of "allocations" were actually furnished by the Wage & Hour Division to Petitioners until the following January; and when the same were furnished to Petitioner Cohn, the Wage & Hour Division refused to

submit to him any books, papers, or other evidence upon which the "allocations" were made, or to disclose to him the "formula" upon which the "schedules" were based. The "schedules" comprise some seven or eight hundred names, and the amounts range from a few dollars to several hundred dollars (Record, pp. 30-41).

Petitioner Cohn refused to sign any checks in accordance with these "schedules", taking the position that he was acting as trustee for Petitioners Berger and Kaminsky in the distribution of the fund, and could not distribute the same except upon *some* evidence at least that the persons named on the schedules were entitled to share in the fund in the amounts stated on the schedules. Whereupon the United States Attorney for the Eastern District of New York petitioned the District Court for an order punishing Petitioner Cohn as for a contempt.

On the hearing of this petition, the Petitioners submitted affidavits of eight persons who were listed on the schedules as being entitled to participate in the fund in substantial amounts, in which the affiants disclaimed ever having made any claim of underpayment under the Fair Labor Standards Act, or that they were entitled to receive any money from either Promenade Clothes, Inc. or Petitioners Berger and Kaminsky on account of any such underpayment. Most of the affiants also showed in their affidavits that *they did not, by reason of the nature of their employment, come under the provisions of the Fair Labor Standards Act* (fols. 256-258, 260-261, 265-266, 270-271, 274-275, 280-281, 285-286, 290-291).

In addition, Petitioners Berger and Kaminsky made affidavit that, according to their books and records, no money was due to any of the persons mentioned on the schedules; that if any moneys were due to any of them, that could only be the result of some errors in bookkeeping; and that, in any event, the sums due would amount only to a small fraction of the fund on deposit with Brooklyn Trust Company (fol. 190).

Petitioner Cohn submitted an affidavit as to the arrangements which led up to the deposit of the fund, and the terms upon which the deposit was made, as well as to the facts with respect to the refusal of the Wage & Hour Division to disclose either to him or to Algase any evidence as to the correctness of the schedules or the "formula" upon which the same were based (fols. 161-176). Algase made similar affidavit with respect to himself (fols. 240-248).

The Wage & Hour Division did not controvert any of the facts stated in the said affidavits. Nor did the Wage & Hour Division present to the Court the slightest evidence as to the correctness of the schedules, or disclose to the Court the alleged "formula" upon which they were based. Nor did any person familiar with the facts make affidavit as to the correctness of the schedules.

The District Court thereupon made an order directing Petitioner Cohn to sign checks drawn upon the Brooklyn Trust Company for the distribution of the fund in accordance with the "schedules" prepared by the Wage & Hour Division. The decision of the United States Circuit Court of Appeals here sought to be reviewed affirmed the said order, holding that Petitioner Cohn was liable to punishment as for a contempt if he failed to comply with its directions.

B

The Statutes Involved

The salient provisions of the Federal Probation Act are as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction

or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend the imposition of execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

"*While on probation* the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation *to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had*, and may also be required to provide for the support of any person or persons for whose support he is legally responsible." (Emphasis supplied throughout unless otherwise stated.)

U. S. C. A., Title 18, Section 724.

"At any time after the probation period, *but within the maximum period for which the defendant might originally have been sentenced*, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

U. S. C. A., Title 18, Section 725.

The provisions of the Fair Labor Standards Act, Title 29, U. S. C. A., Section 216, are as follows:

"Penalties; civil and criminal liability

(a) Any person who wilfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. *No person shall be imprisoned under this sub-section except for an offense committed after*

the conviction of such person for a prior offense under this sub-section.

(b) Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

C

Questions Presented

The questions presented by the case, and of which review is sought by this petition, are as follows:

1. Has a District Court of the United States the power to place on probation a person convicted under, or who pleaded guilty to, an information charging him with a violation of the Fair Labor Standards Act, who had never been convicted of such offense before, in view of the provisions of the Fair Labor Standards Act that persons who have not previously been convicted thereunder are not liable to imprisonment?

2. Has a District Court of the United States, in placing a person on probation, the power to direct the payment of a gross sum of money as alleged "restitution" to a class of persons, without naming the persons to whom "restitution" should be made?

3. Has a District Court of the United States the power to direct, as a condition of probation, the payment, as alleged "restitution", of sums of money to be determined by a person other than the Court itself?

4. Has a District Court of the United States the power, in placing a person under probation upon conviction or a plea of guilty to a particular offense charged in an indictment or information, to direct the payment to persons other than those involved in the offense charged in the indictment or information, because they were allegedly wronged by offenses similar to the one of which the defendant had been convicted or to which he had pleaded guilty?

5. Has a District Court of the United States the power, in placing a defendant under probation, to direct, as one of its conditions, the payment of money to persons other than those mentioned in the indictment or information involved, because they had allegedly been wronged by offenses similar to those charged in the indictment or information, where the aggregate amount so directed to be paid is in excess of any fine which the Court could have imposed as a punishment for the offense charged?

6. Has a District Court of the United States the power, in making a probation order, to impose as one of its conditions the payment of moneys to persons other than those mentioned in the indictment or information, because they had allegedly been wronged by offenses similar to those charged in the indictment or informtaion, where the defendant does not admit that such offenses had been committed or that any amount is due to such persons, and there is no proof before the Court upon which the Court could make a finding or judgment that such amounts are actually due?

7. Has a District Court of the United States the power, in making an order of probation, to impose as a condition thereof, the payment of moneys to persons other than those mentioned in the indictment or information, because they had allegedly been wronged by offenses similar to those charged in the indictment or information, where the defendant does not admit that such offenses had been committed or that anything is due to such persons, and there is no proof before the Court upon which the Court could make a finding or judgment that such amounts are due, and where not only the aggregate amount ordered to be paid but each of the separate amounts directed thereby involves a sum which would entitle the defendant to a trial by jury under the United States Constitution if the person or persons to whom payment is directed were to sue therefor?

8. Has a District Court of the United States, having made an order of probation, and having prescribed, as conditions thereof, the payment of a sum of money as alleged "restitution" to a class of persons assumed to have been wronged by the commission by the defendant of offenses similar to those charged, and the said sum of money having been deposited with the Court in compliance with such order, the power to then make an order distributing such fund to various persons, not named in the order of probation, without a finding or adjudication, or any proof, that such persons had been so wronged or are entitled to share in such fund in the amounts in which distribution is directed?

9. Has a District Court of the United States, in the last mentioned situation, where the class of persons to whom the sum of money is directed to be paid by the probation order is intended to include all of the persons belonging to that class, such persons having an independent right of action against the defendant, the power to make an order dis-

tributing the fund without proof that the distributees are entitled to share therein, thereby exposing the defendant to suits by persons whose claims the deposit was intended to extinguish?

10. Has a District Court of the United States, in placing on probation a person who had pleaded guilty to an information charging him with a violation of the provisions of the Fair Labor Standards Act, by reason of an alleged specific underpayment by a corporation of which he was an officer to one of its employees during a certain week, the power to provide, as one of the conditions of probation, that such person pay as alleged "restitution" all moneys that may be due to employees of such corporation by reason of alleged underpayments by such corporation under the provisions of the Fair Labor Standards Act over a long period of time?

11. Has a District Court of the United States, having made an order placing on probation a person who has pleaded guilty to an information charging him with a violation of the Fair Labor Standards Act, and having directed such person, as one of the conditions of probation, that he pay a gross sum of money as alleged "restitution" to his employees, or the employees of a corporation of which he was an officer, for underpayments under the Fair Labor Standards Act, and such sum having been deposited with the Court in compliance with such order, the power to make an order directing the money so deposited to be distributed in a manner to include persons who do not come under the provisions of the Fair Labor Standards Act?

12. Has a District Court of the United States, having made an order placing on probation a person who has pleaded guilty to an information charging him with a violation of the Fair Labor Standards Act, and having directed in such order that as one of the conditions of

such probation such person pay a gross sum of money to a class of persons therein described, and such person having offered to pay such sum into court for distribution among the persons coming within the provisions of such order, and the Court having refused to accept such sum of money, and such person and the prosecuting agency having thereupon agreed to deposit such sum within a bank, to the order of his attorney and the attorney for the agency, to be distributed by them jointly to the class of persons described in such order, the power to then make an order directing that the fund be distributed to certain persons, without any adjudication, or proof of which a court record is made, that the persons to whom payment is directed to be made in the last order are entitled to share in such fund, or are within the class designated in the probation order?

13. Has a District Court of the United States, in the situation last described as to the manner in which the fund came into existence, the power to make an order directing the distribution of such fund, without consent of the attorney for the person who created the fund, where such attorney, in good faith, refuses to make such distribution because of a lack of proof submitted either to the Court or to him, that the persons to whom distribution is directed are entitled to share in such fund to the extent to which payment to them respectively is directed, and where it affirmatively appears that at least some of the persons to whom payment is so directed are not entitled to share therein and are not members of the class described in the order of probation?

14. Has a District Court of the United States, in the situation last described as to the manner in which the deposit or fund came into existence, the power to direct the attorney for the person creating the fund, who voluntarily assumed the co-trusteeship of such fund in the belief that the fund was to be distributed upon satisfactory proof

of a right to share therein, to distribute the same without such proof, on pain of punishment as for contempt of court for his failure to do so, where the attorney claims in good faith that the distribution ordered is in violation of the agreement under which the fund was deposited, where there is no evidence before the Court that the persons to whom distribution is directed are entitled to share in said fund, and where there is evidence before the Court that at least some of them are not so entitled?

15. Has a District Court of the United States, in the situation last hereinbefore described as to the manner in which the fund came into existence, the power to order the distribution of the fund without actual proof furnished to the attorney for the person who created the fund, or to the Court, that the persons to whom distribution is directed are actually entitled to share in the fund to the extent to which payment to them, respectively, is directed, where there are no actual claimants before the Court, and where none of the persons of the class described in the order of probation as the class to whom "restitution" is to be made is before the Court, so that the order would not constitute an adjudication binding upon them as to the amounts actually due them?

D

Reasons Relied On For the Allowance of the Writ

(1) The questions presented in this case are of crucial importance in the administration of the criminal laws of the United States; particularly in the administration of the Federal Probation Act and in the administration of the criminal provisions of the Fair Labor Standards Act.

(2) The decision sought to be reviewed, insofar as it holds that the District Courts of the United States have

power to place a defendant on probation in a case in which no sentence of imprisonment could be imposed, is contrary to previous decisions of this Court.

(3) The decision sought to be reviewed, insofar as it holds that the District Court of the United States, in placing a defendant on probation, may impose as a condition of such probation the payment of moneys as alleged "restitution", to persons other than those wronged by the specific offense of which the defendant had been convicted or to which he pleaded guilty, is in conflict with the decisions of federal courts in circuits other than the Second Circuit.

(4) The other questions involved, in which the decision sought to be reviewed is not contrary to decisions of this Court or in conflict with decisions in other circuits, have never been passed upon by this Court, and it is in the public interest that those questions be passed upon by this Court and the law with respect to the same authoritatively settled.

E

Jurisdiction

Jurisdiction is claimed under the Judicial Code, Sec. 24 (1), (2), as amended, 28 U. S. C. Sec. 41 (1), (2); Judicial Code, Sec. 128, as amended, 28 U. S. C. Sec. 225; Judicial Code, Sec. 240, as amended, 28 U. S. C. Sec. 347.

WHEREFORE your Petitioners respectfully pray that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review, a full and complete transcript of the record of

all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as your Honorable Court shall deem meet and the circumstances of the case require, and that your Petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, January 6, 1945.

LOUIS B. BOUDIN,
Of Counsel for Petitioners.